certified copy of every document produced by one party shall be communicated to the other party." [6] The Rules provide in Article 48 that "the Registrar shall transmit to the judges and to the parties copies of the pleadings and documents annexed in the case, as and when he receives them." [7] Certified true copies of documents produced or referred to during the oral proceedings, and not previously communicated, must be handed to the Registrar, who communicates them to the agent of the other party so that he may comment upon them if he so desires.[8] During the proceedings in the *S.S. Wimbledon Case,* the Permanent Court decided that it could "only make official use of certain documents on condition of their being communicated to the Parties." [9]

The Court's system of communication through the Registry appears to have proved satisfactory in operation. It has the great merit of enabling the Court to keep full control of the communication of all documents. It also gives regularity and permanence to the proceedings and makes it possible to keep a full record of all acts and documents. The records of proceedings before ad hoc tribunals have often suffered greatly from the haphazard method of communication employed.

Section 22. Inspection and Discovery of Documents. The right of "discovery" of facts peculiarly within the knowledge of one of

[6] The rule concerning the communication of documents produced was derived from Article 64 of the Hague Convention of 1907. Baron Descamps said of the corresponding provision (Article 40) of the Convention of 1899 that it was regarded by the Third Commission as "a guarantee of prime importance." HAGUE CONFERENCE REPORTS 80.

[7] Article 52 of the Rules of the International Court of Justice provides, with respect to documents submitted after the termination of the written proceedings, that the Registry "will inform the Court" of the filing of such documents. *See* discussion of this provision in section 17 *supra*.

Before 1936 Article 47 of the Rules apparently contemplated direct communication between the parties concerning notice of evidence to be produced during the oral proceedings. Article 49 of the 1936 Rules (Article 53, 1972 Rules) was modified to require that the other parties be informed "through the Registry." In criticising the old rule in his Report of June 1933, the Registrar said that the Parties had "only exceptionally . . . communicated beforehand a list of documents which they intended to produce at the hearings" and that the Court had "never asked for the production of such a list." [1936] P.C.I.J., ser. D, No. 2 (3d add.), 825; [1972] I.C.J. ser. D, No. 2, at 19; 11 INT'L LEGAL MATERIALS 899, 912 (1972).

[8] 6 P.C.I.J. ANN. R. (ser. E) 292 (1930); Payment of Various Serbian Loans Issued in France [1929] P.C.I.J. ser. C, No. 16-III, at 14–15.

[9] 1 P.C.I.J. ANN. R. (ser. E) 268 (1925).

the parties is discussed at a later point.[10] The right of parties to have copies of all documents produced communicated to them has as a corollary the rule that if documents are cited or referred to by a party without being produced, the other party shall have a right to the inspection or discovery of such documents.[11] In theory the necessity for the exercise of such a right cannot arise, as the obligation to submit with the pleadings all documents in support is almost always included in arbitral agreements, or in the rules of procedure, with the accompanying rule that copies of all documents be communicated to the parties. In actual practice, documents are at times referred to or even relied on without being submitted.[12]

In the event of such failure or omission to produce a relevant document that is in the possession of the party, the other party is

[10] *See* section 85 *infra*.

[11] *See* section 26 *infra* for discussion of the *Parker Case* before the United States–Mexican Mixed Claims Commission of 1923. *See also* section 31. *Cf.* the following statement by V. Colin and H. Capitant: "The evidence submitted by a party must always be made known to the opposing party in such a manner that he may be in a position to discuss it and to answer it." 2 COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 411 (1931) (translation).

[12] The obligation of disclosure is so comprehensive in Italian procedure that it would seem to render discovery superfluous: "[F]or the purpose of avoiding surprises the parties must constantly indicate beforehand what they intend to prove, by what means and with regard to oral evidence through whom. Matters on which proof is offered must be itemized in order to enable the opponent to raise and the judge to decide questions as to whether the evidence is relevant, material and admissible; the various types of proof of which the parties propose to avail themselves must be indicated beforehand in order that their competence may be scrutinized." Sereni, *Basic Features of Civil Procedure in Italy: A Comparative Study*, 1 AM. J. COMP. L. 373 (1952). *Accord:* Shartel & Wolff, *Civil Justice in Germany*, 42 MICH. L. REV. 863, 883–84 (1944); R. SCHLESINGER, *supra* note 1, at 307; I. SZÁSZY, INTERNATIONAL CIVIL PROCEDURE 278–80 (1967).

W. Buckland and A. McNair describe the procedure of disclosure in Roman law: "There were also rules more analogous to our discovery of documents. In our law the rule seems to be, roughly, that *either party* may call on the other to specify on oath all the documents which are or have been in his possession or power relating to any matter in question in the action; thereupon, he will, subject to a certain claim of privilege in certain cases upon the validity of which the Court will decide, be ordered to produce any or all of these documents for inspection by his opponent. In Roman law the edict *de edendo* gave the defendant the right to call for all documents on which the plaintiff proposed to rely . . . . This is entirely in the interest of the defendant; there was no corresponding right for the plaintiff." ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE 406 (2d ed. rev. 1952).

generally entitled either to be given an opportunity to inspect it or to require that the original or a certified copy thereof be produced. In some cases a request may be made for permission to inspect the original of which a copy has been produced. The right of inspection also may be extended by agreement to include the originals of documents or proof which a party wishes to present in support of its pleadings and which are in the archives or public offices of the other Government and cannot be conveniently withdrawn.[13] There is no such provision in the Statute or Rules of the International Court of Justice, the rule being strictly enforced that requires the production of all documents in support of the pleadings and of all documents cited or relied on in the course of the oral pleadings. Nor is there any provision for the right of discovery, but the Court may, and does, require the production of the originals or duly certified copies of all documents cited or relied upon. When a document is filed that could not be copied, it is placed in a room by the Registrar where it is accessible to the members of the Court and to the Agents of the parties.[14]

The right of discovery is generally limited to documents that have been referred to or relied upon in the pleadings of the other party without being produced and are in the exclusive possession of that party. If requested, the party must in such a case communicate to the tribunal and the other party the original or a certified copy of the document.[15] There is, in addition, of course, the general right to call upon the party through the tribunal for the production of such documents even when not in the exclusive

[13] Orinoco Steamship Co. Case (United States v. Venezuela), 1909, art. VIII, 2 MALLOY, TREATIES 1886; United States-Mexican General Claims Commission, Protocol of April 24, 1934, art. 6 (p), 4 TREATIES, CONVENTIONS, 1923–1937 at 4489, 4494; Spanish-Mexican Claims Commission, 1925, Rules, arts. 29–32, REGLAS DE PROCEDIMIENTO 10 (1927); British-Mexican Claims Commission, 1926, Rules, arts. 24–26, DECISIONS AND OPINIONS 13 (1931); Yukon Lumber Co. Case, Claim No. 5 (United States v. Great Britain), 1910, *Answer of the United States* (April 16, 1913) 3–4, 1 PLEADINGS AND AWARDS (1910).

[14] [1936] P.C.I.J., ser. D, No. 2 (3d add.), 848.

[15] The Halifax Commission (United States v. Great Britain), 1871, art. XXIV, 1 MALLOY, TREATIES 710; Alaskan Boundary Arbitration (United States v. Great Britain), 1903, art. II, *id.* at 789; Japanese House Tax Case (France, Germany, and Great Britain v. Japan), 1902, art. 4, RECUEIL DES ACTES ET PROTOCOLES 14 (1905); Russian Indemnity Case (Russia v. Turkey), 1910, art. 7, PROTOCOLES DES SÉANCES ET SENTENCE 9 (1912).

possession of the party. The right of discovery, in some instances, has been extended to include "any fact or any document deemed to be or to contain material evidence for the party asking it; the

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sometimes accorded in the arbitral agreement, either directly to the tribunal or to the representatives of the parties to be exercised through the tribunal, to call upon the Governments concerned to produce all relevant documents contained in their archives.[17]

In the light of the practice thus described, it may fairly be inferred that in the absence of a specific provision to the contrary in the arbitral agreement, international tribunals have the authority to insure an opportunity to the parties to examine all documents cited or relied upon during the proceedings.

Section 23. Portions or Extracts of Documents. A very difficult question is that presented by the production of portions or extracts of documents without making the full text readily available. There is no objection to the extract itself so long as it represents a thought or fact complete in itself and not dependent upon the context from which it is taken. As was suggested in the discussion in the International Court of Justice concerning the obligation to present documents in support, quoted in section 15,[18] it hardly

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[16] Pious Fund Case (United States v. Mexico), 1902, art. IV, 1 MALLOY, TREATIES 1190. A broad rule of this character was adopted by some of the Mixed Arbitral Tribunals, with the proviso that the means to be used to secure the discovery requested should be subject to the discretion of the Tribunal. For example, see Article 24 (c) of the Rules of the Anglo-German Tribunal. 1 RECUEIL DES DECISIONS 115 (1922).

[17] United States and Mexico, 1848, art. XV, 1 MALLOY, TREATIES 1114; United States–Peruvian Mixed Claims Commission, 1863, art. IV, 2 MALLOY, TREATIES 1409; Salvador Commercial Co. Case (United States v. Salvador), 1901, art. III, 2 MALLOY, TREATIES 1569; Italian–United States Conciliation Commission (Peace Treaty, Feb. 10, 1947, art. 83), Rules, art. 9 (c), 14 U.N.R.I.A.A. 79, 82 (1965) In cases involving lump-sum payments to the United States provision has been made for the respondent state to deliver to the United States any documents in its possession which might have a bearing upon the merits of the individual claims. *See, e.g.*, the United States–Panamanian Claims Convention, Jan. 26, 1950, art. VII, [1950] U.S.T. 685, T.I.A.S. No. 2129; and the United States–Yugoslav Agreement, July 19, 1948, art. 9, 62 Stat. 2658, T.I.A.S. No. 1803.

[18] *See* note 56 of chapter 2.

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